Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1022

ALICE M. CALHOUN,
Petitioner,

vs.

RIVERSIDE RESEARCH INSTITUTE
and COLUMBIA UNIVERSITY
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

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1. 28 U.S.C. §2101(c) 6

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

2. 28 U.S.C. §2107 7

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

3. Rule 4, Fed.R.App.P. 7

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from;

but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Questions Presented

1. Should a petition for certiorari, intended to bring before this Court for review an order in a civil action, be dismissed as untimely where the petition was not filed within 90 days after entry of the order sought to be reviewed and petitioner never sought any extension of time?

2. Should this Court review an order of the United States Court of Appeals for the Second Circuit, dismissing an appeal for lack of jurisdiction where the appeal was from a voluntary discontinuance after settlement and the notice of appeal was not filed for more than one year after entry of the order discontinuing the action?

Statement of the Case

The Order for which review is sought.

Petitioner seeks review of an order entered September 19, 1975, by the United States Court of Appeals for the Second Circuit, dismissing for lack of jurisdiction her appeal, for which notice was filed July 15, 1975, from her voluntary discontinuance, in June 1974, of an action after settlement. On October 17, 1975, the Court of Appeals denied petitioner's motion for reconsideration of its dismissal. (Both orders are set out at page 14 of Appendix A to the petition.)

The petition for certiorari was docketed January 19, 1975, more than 90 days after entry of the Court of Appeals' order dismissing the appeal and its order denying reconsideration.

The proceedings below.

Petitioner commenced this action in the United States District Court for the Southern District of New York, for an injunction and to recover damages for alleged discrimination against her in employment by respondent Riverside Research Institute (the action was voluntarily discontinued as against Columbia University). Following some four years of pendency during which the parties conducted and concluded extensive discovery proceedings, petitioner agreed voluntarily to discontinue the action in exchange for respondent's payment of $5,900, which sum represented her out-of-pocket disbursements. On June 26, 1974, the District Court (Hon. Whitman Knapp), in the presence of petitioner, her husband and her attorney, inquired of petitioner, and

the petitioner answered, regarding the settlement agreement as follows:

"THE COURT: I take it you represent that this settlement takes into account any claims you have against Riverside Research Institute?

"MRS. CALHOUN: Yes, I am under the impression that once you have settled, there is no recourse.

"THE COURT: You represent to me that you have no claims of any sort against Riverside Research or anybody there?

"MRS. CALHOUN: Yes.

"THE COURT: That is not taken care of by this settlement?

"MRS. CALHOUN: I do."*

Accordingly, the District Court "so ordered" a stipulation discontinuing the

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*A copy of the transcript of Judge Knapp's settlement conference has been lodged with the Court.

action. On July 1, 1974, respondent delivered a check for $5,900, which check petitioner cashed.

On July 15, 1975, more than one year after entry of the stipulation and order, petitioner filed a notice of appeal from the order. Thereafter, respondent moved in the Court of Appeals to dismiss the appeal for lack of jurisdiction on the grounds that the appeal was untimely and that no appeal lay from an order to which petitioner had consented. It is the Court of Appeals' order, entered September 19, 1975, granting that motion that petitioner seeks to have this Court review. Petitioner's subsequent motion to the Court of Appeals for reconsideration was denied in its order entered October 17, 1975.

Argument

POINT I

THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS UNTIMELY, SINCE IT WAS NOT FILED WITHIN NINETY DAYS FROM THE ENTRY OF THE ORDER SOUGHT TO BE REVIEWED.

The order dismissing petitioner's appeal for lack of jurisdiction was entered September 19, 1975, and its order denying reconsideration was entered October 17, 1975. The petition for certiorari was docketed January 19, 1976 - ninety-four days after the October 17, 1975 order. Thus the petition was not filed timely, according to 28 U.S.C. §2101 and, there having been no motion to extend the time for filing, the Supreme Court is without jurisdiction to entertain the petition.

POINT II

THE PETITION SHOULD BE DISMISSED BECAUSE THERE ARE NO QUESTIONS MERITING REVIEW BY THIS COURT

The petition for certiorari seeks review of orders of the Court of Appeals dismissing for lack of jurisdiction petitioner's appeal from the District Court's "so ordering" of a stipulation of discontinuance and denying her application for reconsideration.

The Court of Appeals' order dismissing the appeal for lack of jurisdiction was ineluctably correct, as the appeal was untimely (28 U.S.C. §2107; Rule 4(a), Federal Rules of Appellate Procedure) and petitioner had consented to the District Court's order and accepted the settlement payment, and was, therefore, not aggrieved (see Martin Marietta Corp. v. I.T.C.,

376 F.2d 430, 433-34 (7th Cir.), cert. denied, 389 U.S. 923 (1967); Kelly's Trust v. Commissioner, 168 F.2d 198, 199 (2d Cir. 1948); Thonen v. Jenkins, 455 F.2d 977 (4th Cir. 1972)). There are no legal questions presented by the petition, much less any important issues of federal law. Thus, even if there were jurisdiction to entertain the petition for certiorari, there would be no reason to do so.

Conclusion

For the foregoing reasons, the petition should be dismissed.

February 13, 1976

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